Filed 7/30/12 P . v. Hoffman CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

KYLE HOFFMAN et al.,

Defendants and Appellants.

F061127

(Super. Ct. Nos. BF125737A & BF125737B)

ORDER MODIFYING OPINION AND DENYING REHEARING

[CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on July 5, 2012, be modified as follows:

1. On page 2, the first full paragraph, last two sentences, beginning "Hoffman now raises" are deleted and the following sentences inserted in their place:

> Hoffman now raises claims of trial error and insufficiency of the evidence, while both challenge the propriety of their sentences. We affirm the convictions, but vacate both sentences and remand the matters for new hearings under section 190.5 and for resentencing.

2. Section V of the Discussion, beginning on page 41 of the original opinion, is deleted in its entirety and replaced with the following:

V

IMPOSITION OF LWOP SENTENCES ON JUVENILES

Prior to sentencing, defendants each unsuccessfully challenged the constitutionality of an LWOP sentence when imposed on a juvenile, and asked the trial court to exercise its discretion under section 190.5, subdivision (b) to impose a sentence of 25 years to life. On appeal, they originally contended imposition of a sentence of LWOP on a juvenile — even one who killed — violates the federal and state Constitutions. They argued that under the analysis set out in *Graham v. Florida* (2010) 560 U.S. ___ [130 S.Ct. 2011] (*Graham*), the Eighth Amendment to the United States Constitution requires *all* juveniles to be afforded a meaningful opportunity to be considered for release. Hoffman additionally contended his sentence was unconstitutionally disproportionate to his individual culpability. In their petitions for rehearing, however, they took the position that, in light of the recent United States Supreme Court opinion in *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455] (*Miller*), they are entitled to have their sentences vacated and their cases remanded for new hearings under section 190.5 and for resentencing. We solicited a response from the Attorney General, and now agree defendants should be afforded new hearings under section 190.5 and then resentenced.[16]

The Eighth Amendment to the United States Constitution prohibits infliction of "cruel *and* unusual" punishment. (Italics added.) Article I, section 17 of the California Constitution prohibits infliction of "[c]ruel *or* unusual" punishment. (Italics added.) The distinction in wording is "purposeful and substantive rather than merely semantic. [Citations.]" (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085.) As a result, we construe the state constitutional provision "separately from its counterpart in the federal Constitution. [Citation.]" (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136.) This does not make a difference from an analytic perspective, however. (*People v. Mantanez* (2002) 98 Cal.App.4th 354,

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16 Government Code section 68081 provides: "Before … a court of appeal … renders a decision in a proceeding …, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party."

Here, the issue — the constitutionality of defendants' LWOP sentences — was proposed by defendants and addressed by all parties in their original briefs. Accordingly, the statute does not preclude us from modifying our original opinion without granting rehearing.

358, fn. 7.) The touchstone in each is gross disproportionality. (See *Ewing v. California* (2003) 538 U.S. 11, 21 (lead opn. of O'Connor, J.); *Rummel v. Estelle* (1980) 445 U.S. 263, 271; *People v. Dillon* (1983) 34 Cal.3d 441, 479.)

"The [United States Supreme] Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty." (*Graham, supra*, 130 S.Ct. at p. 2021; see, as examples of second category, *Kennedy v. Louisiana* (2008) 554 U.S. 407, 413 [8th Amend. prohibits imposition of death penalty for rape of child where crime did not result, and was not intended to result, in death of victim]; *Roper v. Simmons* (2005) 543 U.S. 551, 572-573 (*Roper*) [same re: defendants who committed their crimes before age 18]; *Atkins v. Virginia* (2002) 536 U.S. 304, 321 [same re: mentally retarded offenders]; *Ford v. Wainwright* (1986) 477 U.S. 399, 410 [same re: insane/incompetent prisoners].)

In *Graham*, the high court considered, for the first time, a categorical challenge to a term-of-years sentence (*Graham, supra*, 130 S.Ct. at p. 2022), and concluded the Eighth Amendment does not permit a juvenile offender to be sentenced to LWOP for a nonhomicide offense. (*Graham*, at p. 2033.) The high court reasoned: (1) LWOP sentences are imposed on juvenile nonhomicide offenders so rarely, even in jurisdictions in which such sentences are authorized, that it is fair to say a national consensus has developed against the imposition of such sentences (*id*. at pp. 2023-2026); and (2) the challenged sentencing practice does not sufficiently serve legitimate penological goals (*id*. at pp. 2026-2030). The court reached the latter conclusion because (1) juveniles, having lessened culpability as compared to adults, are less deserving of the most severe punishments, since they lack maturity and have an underdeveloped sense of responsibility, are more susceptible to negative influences and outside pressures, and cannot reliably be classified among the worst offenders as a greater possibility exists that a minor's character deficiencies will be reformed (*id*. at pp. 2026-2027); (2) defendants who do not kill, intend to kill, or foresee that life will be taken are less deserving of the most serious forms of punishment than are murderers, and so a juvenile offender who did not kill or intend to kill "has a twice diminished moral culpability" (*id*. at p. 2027); (3) LWOP is the second most severe punishment permitted by law, exceeded only by the death penalty, and its denial of any hope of restoration of life's most basic liberties constitutes an especially harsh punishment for a juvenile (*id*. at pp. 2027-2028); and (4) the legitimate goals of penal sanctions — retribution, deterrence, incapacitation, and

rehabilitation — do not provide adequate justification for LWOP for juvenile nonhomicide offenders (*id*. at pp. 2028-2030).

In conclusion, the court stated: "A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society." (*Graham*, *supra*, 130 S.Ct. at p. 2030.)

In *Miller*, *supra*, 132 S.Ct. 2455, the United States Supreme Court considered juvenile homicide offenders. After discussing *Graham*, *Roper*, and other pertinent cases, the court concluded:

> "We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. [Citation.] By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. Because that holding is sufficient to decide these cases, we do not consider [the] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' [Citations.] Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it

> to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Miller, supra,* 132 S.Ct. at p. 2469, fn. omitted.)

Miller applies both to killers and nonkillers.[17] It does not directly impact California's sentencing scheme because, as the United States Supreme Court recognized, California does not mandate LWOP for juveniles convicted of special-circumstance murder; rather, section 190.5, subdivision (b) makes LWOP discretionary for juveniles. (*Miller, supra,* 132 S.Ct. at pp. 2471-2472, fn. 10.)[18] The high court stated: "*Graham, Roper,* and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." (*Id.* at p. 2475.) Section 190.5, subdivision (b) provides that opportunity.

Subdivision (b) of section 190.5 "requires 'a proper exercise of discretion in choosing whether to grant leniency and impose the lesser penalty of 25 years to life for 16- or 17-year-old special circumstance murderers.'" (*People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089.) Prior to *Miller*, "'[t]he choice whether to grant leniency of necessity involve[d]

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[17] *Miller* comprised two cases involving offenders (Miller and Jackson) who were 14 years old when they committed their crimes. Miller was the actual killer; he received a mandatory LWOP sentence because the murder was committed in the course of arson. Jackson was not the actual killer, and may not have intended to kill, but was subject to a mandatory sentence of LWOP because he aided and abetted a robbery of a video store knowing that one of his coperpetrators was armed with a shotgun. Jackson's coperpetrator shot and killed the store clerk during the course of the robbery. (*Miller, supra,* 132 S.Ct. at pp. 2461, 2462-2463.)

In his concurring opinion in *Miller*, Justice Breyer observed that, should the state continue to seek a sentence of LWOP for Jackson, there would have to be a determination whether Jackson killed or intended to kill the robbery victim. (*Miller, supra,* 132 S.Ct. at p. 2475 (conc. opn. of Breyer, J.).) Under the instructions given each defendant's jury in the present case, in order to find the multiple-murder special circumstance true, jurors necessarily found each defendant either killed or intended to kill.

[18] Section 190.5, subdivision (b) provides: "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances … has been found to be true …, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life."

an assessment of what, in logic, would mitigate or not mitigate the crime.'" (*Ybarra, supra,* at p. 1089.)

The trial court here did not abuse its discretion under the law as it stood at the time it ruled on defendants' requests under section 190.5 and defendants' claims LWOP sentences were unconstitutional for juveniles. Nevertheless, after *Miller*, an assessment of traditional factors in aggravation and mitigation (see Cal. Rules of Court, rules 4.421, 4.423), as the trial court undertook in exercising its discretion under section 190.5, subdivision (b), is not enough. Those factors, while still relevant, cannot supplant the factors deemed paramount in *Miller*: the juvenile's "chronological age and its hallmark features — among them, immaturity, impetuosity, and failure to appreciate risks and consequences," "the family and home environment that surrounds him — and from which he cannot usually extricate himself — no matter how brutal or dysfunctional," "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him," "that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth — for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys," and "the possibility of rehabilitation." (*Miller, supra,* 132 S.Ct. at p. 2468.)

Because these and other characteristics discussed in *Miller* were not at the forefront of the factors considered by the trial court when exercising its discretion in the present case, defendants are entitled to have the trial court reconsider its decision under section 190.5, subdivision (b) in light of *Miller*, and to be resentenced accordingly.[19]

3. Section VI of the Discussion, at page 49 of the original opinion, is deleted in its entirety.

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19 We express no opinion concerning how the trial court should rule. If it again sentences either defendant to LWOP, however, it should not impose a parole revocation restitution fine pursuant to section 1202.45 on said defendant(s). (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 819; *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183; cf. *People v. Brasure* (2008) 42 Cal.4th 1037, 1075.)

In light of our conclusion, any argument that an LWOP sentence is disproportionate to defendants' individual culpability (see, e.g., *Enmund v. Florida* (1982) 458 U.S. 782, 783-786, 798; *People v. Dillon, supra,* 34 Cal.3d at pp. 480, 482-489) is premature at this point.

4. The Disposition, at page 49 of the original opinion, is deleted in its entirety and replaced with the following:

DISPOSITION

> The judgments of conviction are affirmed. The sentences imposed in Kern County Superior Court case Nos. BF125737A and B are vacated, and the matters are remanded to the trial court to exercise its discretion under Penal Code section 190.5 in light of *Miller v. Alabama*, *supra*, 132 S.Ct. 2455, and to resentence defendants accordingly.

Except for the modifications set forth, the opinion previously filed remains unchanged.

This modification does effect a change in judgment.

The petitions for rehearing filed by defendants are denied.

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DETJEN, J.

WE CONCUR:

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GOMES, Acting P.J.

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FRANSON, J.